United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4119

United States Court of Appeals

FOR THE SECOND CIRCUIT

BETHLEHEM STEEL CORPORATION,
Petitioner,

VS.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITIONER'S BRIEF

PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER,
Attorneys for Petitioner,
3400 Marine Midland Center,
Buffalo, New York 14203,
Tele. (716) 847-8400.

Of Counsel:
DAVID K. FLOYD.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
716-343-0457

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In the

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Issues Presented

1) Does this Court have jurisdiction under the Federal Water Pollution Control Act as to the approval or partial approval by the Environmental Protection Agency of New York State water quality standards?

2) Did the Environmental Protection Agency act beyond its authority under the Federal Water Pollution Control Act by promulgating a partial approval of New York's water quality standards following the mandated statutory deadline for its final promulgation of federal water quality standards?

3) Did the Environmental Protection Agency act beyond its authority where, by a purported approval, it emasculated New York's water quality standards relating to thermal criteria?

Statement of the Case

This Petition for Review was filed on June 23, 1975 seeking review under Section 509 of the Federal Water Pollution Con-

trol Act ("FWPCA") of the EPA's promulgation, on March 25, 1975, partially approving the thermal aspects of New York State's revised water quality standards. EPA subsequently moved to dismiss this Petition contending that its promulgation did not constitute action reviewable under Section 509. This Court, by its order of August 27, 1975, denied this motion "without prejudice to respondents' assertion of lack of jurisdiction on hearing the said petition."

Petitioner's brief therefore will also treat this jurisdictional question raised by EPA.

Facts

The State of New York, as part of its water quality program under its then Public Health Law (Article 12), had adopted in 1969 regulations governing the discharge of heated liquids (*i.e.*, thermal discharges) into the waters of the State (App. 41-60).[1] These early regulations had established an overall standard prohibiting thermal discharges "injurious to fish life. . .or impair[ing] the waters for any other best usage." These 1969 regulations then set forth, certain specific criteria as to temperature, etc., but limited the specific application of these criteria to thermal discharges coming into existence after the adoption of the regulations in July 1969. As to those thermal discharges existing prior to July 1969, the overall standard was to be applied, but the specific criteria were "intended only to be a frame of reference" (App. 46).

Thus, the State of New York determined to impose an overall uniform standard upon those discharging heated liquids into its waters, but not necessarily to impose specific numerical criteria on sources existing prior to the adoption of these regulations.

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[1] This and subsequent similar references are to the pages of the Appendix filed separately in this proceeding.

After adoption of the 1972 Amendments to the Federal Water Pollution Control Act (33 U.S.C. Sections, *et seq.*), it was required that the Environmental Protection Agency ("EPA") review and, if satisfactory, approve by January 18, 1973, the respective existing water quality standards and implementation plans of the various states (Section 303 [33§1313][2]). New York's water pollution regulations, including those relating to thermal discharges were so reviewed and on January 17, 1973, EPA notified Governor Rockefeller of its disapproval of various aspects of these regulations and the changes that it recommended be made (App. 97 *et seq.*). These recommendations by EPA as to New York's water standards included criteria relating to thermal discharges (App. 146-48).[3]

In accordance with Section 303(a) (1) [33§1313(a) (1)] of the FWPCA, EPA advised Governor Rockefeller that New York had 90 days to adopt the changes recommended by EPA. If New York did not, the advice continued, the FWPCA required that EPA "promptly prepare and publish proposed regulations setting forth water quality standards" for the State (Section 303(b) (1) [33§1313(b) (1)]). EPA's advice observed, however, that New York had "at least 310 days to adopt necessary revisions before EPA must finally promulgate (90 days after notifying Governor or State agency; 30 days for EPA to promptly propose if State hasn't adopted; and an additional 190 days for EPA to promulgate if State hasn't finally adopted)" (App. 100). EPA, however, as discussed below, ignored its own schedule and that dictated

[2] For the convenience of the Court, this and subsequent references to sections of the FWPCA will include references both to the section of the Act and to the U.S.C. section. The sections of the FWPCA referred to in this Brief are set forth as a supplement at the end of the Brief.

[3] This advice to Governor Rockefeller of January 17, 1973, related specifically to *inter*state waters. A subsequent EPA letter to Governor Rockefeller of March 13, 1973 (App. 159), took the same approach as to changes required as to *intra*state waters.

by statute. It never did finally promulgate any such regulations even though its purported partial approval of New York's subsequent revised thermal regulations was not 310 days, but 797 days, following its advice on January 17, 1973, to New York State that its water standards required revision.

While EPA's recommended changes to New York's standards did include suggested thermal criteria, nowhere did its recommendations raise any issue as to the limitation in New York's regulations that its specific numerical thermal criteria would apply directly only to sources coming into existence after July 25, 1969. The question as to this limitation (referred to at times as a "grandfather" clause) did, however, arise in the course of discussions between New York and EPA representatives. See *e.g.*, EPA Memorandum of April 13, 1973 (App. 161, at p. 162), noting that in these discussions:

> "New York State was further concerned about the applicability of the proposed standards; they pointed out that New York State regulations include a *'grandfather' clause for existing thermal discharges.* EPA responded that we would have to check further to determine whether this could be allowed and *EPA will get back to New York State*" (Emphasis in original).

New York did not immediately revise its water quality standards. Thus, as mandated by Section 303(b) (1) [33§1313(b) (1)], EPA embarked upon the preparation and publication of proposed regulations for New York State. See EPA letter of May 4, 1973 to Governor Rockefeller (App. 167-69). Though required by statute to do so "promptly", EPA, while expressing its hopes to publish such proposed regulations by June 15, 1973 (App. 168), did not do so until December 20, 1973 (App. 22-24). EPA's proposed water quality regulations for New York contained no provisions whatsoever relating to thermal discharges.

In the meantime, New York was considering and responding to EPA's proposals and planning public hearings in re-

spect to such changes. See letter of June 8, 1973, from New York's D.E.C. to EPA (App. 171-73). There was no question from these responses that, while EPA was now suggesting that New York's thermal numerical criteria be made appliable to all thermal discharges, New York was continuing its adherence to the concept that such criteria would apply only to "new thermal discharges or modifications to existing thermal discharges" (see, *e.g.*, App. 174). EPA remained adamant and in June 1973, advised New York that EPA's proposed regulations would contain "enforceable and finite thermal criteria" (App. 181).

However, it was not until December 20, 1973, over six months after its self-imposed deadline, that EPA finally published its proposed water quality standards for the State of New York (App. 22-4). These proposed standards, however, except for the "waters of the mainstem of the Delaware River", contained no thermal standards of criteria for New York's waters. EPA never did (within the required 190 days or otherwise), finally publish any water quality standards of its own for New York.

In the meantime, New York in July and August 1973, was holding its required public hearings in respect to its revised water quality standards. See, generally, the Hearing Officer's Report, dated May 31, 1974 (App. 211-230). The EPA's recommended changes to New York's application of numerical thermal criteria only to post-1969 and modified sources was noted in the hearing record (App. 217-19), and a significant portion of the hearings were devoted to testimony and discussion as to these divergent approaches to the application of the specific thermal criteria (See App. 226-27). The Hearing Officer's Report concluded with the recommendation that New York's regulations should continue to apply their specific numerical thermal criteria only to post-1969 and modified sources (App. 230).

Following these New York hearings, there were considerable efforts by both EPA and representatives of the State of New York to reconcile their differences as to application of these thermal criteria. EPA withheld its approval pending consideration of New York's "grandfather" clause by its attorneys (App. 182-83; 187-90). Last minute changes to New York's thermal regulations were proposed in an attempt to resolve these differences (App. 184-86 and 191).

On September 20, 1974 (to be effective on October 20, 1974), New York formally adopted and transmitted to EPA its thermal discharge regulations (App. 192-204). These regulations continued the separate treatment accorded by the earlier regulations to pre-1969 sources. Thus, while such sources were subjected to the general water quality standard for thermal discharges under Section 704.1 of these regulations (App. 194), they were not, except under certain circumstances, to be subject to either the general or specific numerical criteria set forth in these regulations. See the provisos set forth in Sections 704.2 and 704.3, and also Section 704.6, "Applicability of Criteria" (App. 200).

In November 1974, New York submitted Part 704, as just adopted, to EPA for its approval in accordance with Section 303(a) of the FWPCA [33§ 1313(a)] (App. 209). Counsel for New York's Department of Environmental Conservation urged that the general exemption of pre-1969 sources from the specific numerical criteria was fully justified and that the new Part 704 should be approved (App. 205-8). Associate General Counsel for EPA, by letter of November 20, 1974 (App. 231), urged that such a general exemption was contrary to the FWPCA and recommended that New York's Part 704 be disapproved by EPA.

EPA did neither. Instead, on February 23, 1975, EPA advised New York that it was approving New York's water quality standard and its numerical thermal criteria, but was

"exempting" from consideration the provisions of Part 704.6 (App. 209-10). Thus, after long months of federal-state debate, and long after its statutory deadline, EPA by curious rhetoric, had purportedly approved New York's water quality standard and criteria, but had, in fact, only partially approved New York's standard in that it had ignored the applicability of that standard and criteria to sources within New York. EPA's action was subsequently published in the Federal Register on March 25, 1975 (App. 25).

* * *

The action by EPA in respect to the thermal standards for New York water quality control was contrary to the dictates of the FWPCA and should be set aside. First, it failed to propose or publish any thermal standards or criteria for New York as required by statute upon New York's failure to do so. Second, when it finally did take action upon New York's thermal regulations, it emasculated the regulatory scheme adopted by New York by, in effect, attempting to modify them to apply New York's thermal criteria to all sources.

ARGUMENT

I.

This Court has Jurisdiction.

This Court, by its Order of August 27, 1975, deferred any consideration of EPA's jurisdictional argument until oral argument on the petition.

This Court has jurisdiction as to this Petition for Review under the provisions of Section 509(b) of the Federal Water Pollution Control Act. Such jurisdiction is premised upon the fact that, while EPA's review and so-called approval of New York's thermal water quality standards was in accordance with the mechanics set forth in Section 303 of the Act, the

resulting standards, when applied to discharge permits issued under Section 402, were pursuant to the overall mandates of Section 301 as to which the several Courts of appeal are specifically accorded review jurisdiction.

The specific action by EPA for which Petitioner seeks review was stated to have been taken pursuant to Section 303. EPA's earlier motion to dismiss was grounded on the proposition that this Court has no jurisdiction to review EPA action taken pursuant to Section 303 of the Act. The Federal Water Pollution Control Act provides in Section 509(b) (33§ 1369) for direct review of EPA action in the various circuit Courts of appeal:

> "(E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 of this title . . ."

EPA urges that the absence of any specific reference to Section 303 in this provision relating to Court review deprives this Court of jurisdiction to review its action of March 25, 1975. This position is erroneous and far too restrictive an interpretation of this review section of the Federal Water Pollution Control Act. The structure of this Act clearly contemplates that State-promulgated water quality standards and limitations constitute "limitations" under Section 301 of the Act. This is particularly true where, as here, these particular regulations as promulgated by the State of New York fall in an area, i.e., thermal water quality standards, where the EPA has not yet established any limitations or guidelines of its own.

The framework of the Federal Water Pollution Control Act, as amended in 1972, provides for the establishment and implementation of effluent limitations in its Subchapter III, Sections 301-318 of the Act, (33 U.S.C., Sections 1311-1328), entitled "Standards and Enforcement." The initial section, Section 301, provides generally for the establishment of effluent limitations:

"Section 301

* * *

"Timetable for achievement of objections
(b) In order to carry out the objective of this chapter there shall be achieved—

"(1) (A) not later than July 1, 1977, effluent limitations for point sources . . .

* * *

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, *established pursuant to any State law or regulations (under authority preserved by section [510] of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter."* (Emphasis added.)

Subsection (e) of Section 301 then states:

"(e) Effluent limitations established pursuant to this section or section [302] of this Act shall be applied to all point sources of discharges of pollutants in accordance with the provisions of this Act."

It is thus apparent from these provisions of Section 301 that Congress envisioned that the effluent limitations under the Act would consist of those established both by the Environmental Protection Agency on the federal level *and* by the various states. The Act's definition of "effluent limitation", found in Section 502(11)[33§ 1362], demonstrates that the term "limitations" used in Section 301 refers to those promulgated by both the EPA and the various states:

"The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

The subsequent sections in this Subchapter then set up the procedures for the establishment of these limitations.

Section 303 [33§ 1313] prescribes the mechanics for the submission of state-devised limitations for review and approval by the EPA. Section 303, in pertinent part, provides:

"Section 303

* * *

"(a) (2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. *Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act* unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section." (Emphasis added.)

* * *

"(c) (2) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator."

* * * *

"(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, deter-

> mines that such standard meets the requirements of this Act, *such standard shall thereafter be the water quality standard for the applicable waters of that State."* (Emphasis added.)

Thus, Section 303, as reflected in the emphasized portions, specifically provided that those state regulations approved by the EPA are to constitute water quality standards to the same extent as those promulgated by the EPA itself.

That state-promulgated regulations fall within the limitations provided for under Section 301 is further demonstrated by the very Court decision cited by EPA in support of its earlier motion to dismiss—*CPC International, Inc. v. Train,* 515 F.2d 1032 (8th Cir. 1975). There, the Eighth Circuit concluded that EPA had no authority to issue effluent limitation *regulations* under Section 301. If that is the case, there would be no purpose whatsoever for Congress to have included "Section 301" in the Court-review provisions unless that reference was intended to encompass state-promulgated *limitations* approved under the mechanics set forth in Section 303. *Cf.*, however, *DuPont v. Train,* 8 E.R.C. 1506 (4th Cir. December 30, 1975); *American Iron and Steel Institute v. EPA,* 8 E.R.C. 1321 (3rd Cir. November 7, 1975); and *American Meat Institute v. EPA,* 8 E.R.C. 1369 (7th Cir. November 24, 1975), where three other Circuit Courts of Appeal concluded that Section 301 did provide EPA with a source of authority to promulgate effluent limitations.

However, even assuming that EPA has authority to promulgate limitations under Section 301, the review provisions of Section 509 (b)(1)(E) provide for review of EPA action in "*approving* or promulgating any effluent limitation." There is no "approval" of limitations that is specifically required or contemplated in the sections enumerated in Section 509, *i.e.*, Sections 301, 302, or 306. (The approval under Section 306 is limited to state enforcement procedures and does not concern effluent limitation.) Thus the term "approving" could only be

applicable to EPA action as to state-devised limitations under the mechanics of Section 303.

A holding that the circuit Courts did not have jurisdiction as to EPA approval of state-devised limitations would leave an unwarranted bifurcation of review between those limitations and standards promulgated by EPA and those devised by the states as to which EPA must review and approve. Further, EPA under Section 303 is required (as it, indeed was here), to promulgate limitations and standards for a state if that state fails to do so itself. EPA's contentions here would leave such promulgations unreviewable in the circuit Courts. The Court in *DuPont v. Train, supra,* 8 E.R.C. 1506, at p. 1510, was faced with an analogous contention and held:

> "It is significant to note that section 306 provides for the issuance of regulations 'establishing Federal standards of performance for *new* sources [of pollutants].' 33 USC § 1316 (emphasis added). Section 301, by way of contrast, is concerned with existing sources. Were we to accept appellants' interpretation of the Act, review of regulations governing existing sources would lie in the district courts under the Administrative Procedure Act, while review of new source standards would be before the courts of appeals under § 509. We do not conclude that Congress intended for review to be bifurcated in this manner.
>
> "While there is little legislative history relating to § 509, it is highly significant that the committee reports make no mention of any division of judicial review."

Nor would there be any effective means by which Petitioner could obtain review of EPA's action in respect to this New York regulation in the New York Courts. Petitioner, of course, does not here seek review of the provisions of the New York regulation. It is EPA's emasculation of that regulation as to which Petitioner seeks relief.

This action by EPA in respect to New York's thermal water standards, while administratively pursuant to Section 303, is,

in fact, a fulfillment of the mandates and objectives set forth in Section 301 and, therefore, specifically reviewable. As concluded by the Court in *DuPont v. Train, supra,* at p. 1511:

> "The EPA contends that, this being the intent of Congress, § 301 must be viewed as authorizing the promulgation of effluent limitation regulations. Otherwise, they argue, § 509's reference to § 301 would be meaningless. We are not persuaded that this conclusion must necessarily follow in order for this court to find jurisdiction under § 509.
>
> "Even if § 301 merely sets out the technological objectives to be attained under the Act, courts of appeals may properly assume jurisdiction to review actions of the Administrator in issuing regulations to achieve these objectives. If § 301 is to be viewed in the manner advocated by the appellants, then § 304(b) must necessarily be deemed the key to the attainment of the objectives set forth in § 301. Thus, to obey the mandate of § 301, 'guidelines for effluent limitations' must be promulgated under § 304(b). Construed in this light, any action taken by the Administrator under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509.
>
> "By enacting § 509(b), Congress established a statutory plan to be followed to obtain judicial review of agency actions under the Act. Only those courts upon which Congress has bestowed authority have jurisdiction. See *Whitney Bank v. New Orleans Bank,* 379 US 411, 420, 422."

EPA's earlier application to dismiss this Petition for lack of jurisdiction should be denied.

II.

EPA Failed to Promulgate Thermal Standards Within Mandatory Statutory Deadline.

The Federal Water Pollution Control Act, Section 303(b) [33 § 1313(b)] requires EPA to promulgate water quality stan-

dards for a State that fails to adopt acceptable standards within the time prescribed by the Act.

EPA, on January 17, 1973, advised New York State that its proposed water quality standards were unacceptable. Under the statutory deadlines, New York had 90 days, *i.e.*, until April 18, 1973, to revise and adopt acceptable standards. It did not and, on May 4, 1973, EPA advised New York that EPA, as mandated by statute was going to propose its own water quality standards regulations for New York [App. 167]. The FWPCA required that such proposed regulations be prepared and published "promptly" (Section 303(b)(1)). EPA had interpreted this to mean 30 days [App. 139], but stated it hoped to do so by June 15, 1973 (*i.e.*, within about 60 days) (App. 168). In fact, such proposed regulations (which contained no overall standards or criteria whatsoever), were not published until December 20, 1973—over seven months after its own self-imposed 30-day deadline [App. 22-24].

The FWPCA further mandated that EPA, unless the State had in the meantime adopted acceptable standards, publish its own final regulations for the State within 190 days after publication of the proposed standards (Section 303(b)(2)). Thus, EPA's final regulations, since New York did not in the meantime adopt such acceptable standards, were required to publish by June 28, 1974. EPA never did publish such final regulations, even though its subsequent partial "approval" was not until nearly *nine* months later, on March 25, 1975 (App. 25).

These statutory deadlines impose a mandatory, nondiscretionary duty upon EPA. *Cf. Natural Resources Defense Council v. Train,* 510 F.2d 692, 704 (D.C. Cir. 1974), concerning the EPA's duty to publish effluent limitation guidelines under Section 304 of the FWPCA.

EPA's failure to adhere to these mandatory deadlines has now imposed upon New York and the owners of sources

within the State an intolerable situation. On one hand, there are no EPA thermal water quality standards and, on the other, there is, as discussed below, a State-adopted standard that has been emasculated by EPA's attempted partial approval.

On this ground alone, this matter should be remanded to EPA for action consistent with the FWPCA.

III.

EPA was Without Authority in Attempting Partial Approval of New York's Thermal Water Quality Standards.

New York for years had, in respect to its thermal water quality standards and criteria, differentiated among various aged sources in the *per se* application of its specific numerical criteria (See, *e.g.*, July 1969 Regulations, App. 42, at p. 46-7). Thus, sources existing prior to 1969 were subject to the overall thermal standards prohibiting heated discharges "injurious to fish life . . . or impair[ing] the waters for any other best usage," but were not necessarily subject to the specific numerical criteria set forth in New York's regulations.

The history of the development of these thermal standards demonstrates that this distinction was a substantive and integral aspect of New York's thermal discharge regulations. A running debate between New York and federal authorities as to New York's policy of limiting the *per se* application of specific number criteria to post-1969 sources started even prior to the advent of EPA in December 1970. See, *e.g.*, the Department of Interior's critique of July 1969 (App. 62, at p. 67 and 70). New York persisted in its adherence to its more general, but absolute, standard with a flexible application of its specific number criteria to older sources. See App. 174, for a juxtaposition of the New York and EPA views.

As required, New York in 1973 held public hearings as to its newly proposed thermal standards. See Hearing Officer's Report, dated May 31, 1974 (App. 211). At these hearings, EPA presented a policy statement opposing New York's approach to pre-1969 sources (App. 226). However, the Hearing Officer determined that EPA's position dictated an inflexible application to specific numerical criteria and was not supported by EPA's own experts' testimony (App. 226). The Hearing Officer in his Report concluded by recommending (App. 230):

> "It is recommended that all thermal discharges comply with a single, non-numerical water quality standard that will protect aquatic life. *Criteria Governing Thermal Discharges,* Part 704, should continue to apply to new thermal discharges and modifications to existing discharges. Existing thermal discharges (those approved before 1969) should not be subject to the criteria of Part 704, however, mandatory compliance with the water quality standard must remain."

Although there were some last minute amendments in an apparent attempt to satisfy EPA (see App. 184), the thermal regulations finally adopted by New York and submitted to EPA continued the dichotomy as to application of its numerical thermal criteria between pre-and post-1969 sources (App. 192-204).

This feature of New York's regulation continued to trouble EPA. A legal opinion was sought by EPA Region II from its Washington counsel as to the approvability of the New York regulation in view of this particular feature (App. 187-90). The question was posed as to whether EPA must consider the numerical thermal criteria as part of the water quality standard and, if so, whether the absence of a *per se* application of such numerical criteria invalidated New York's regulations (App. 188-89). New York's attorneys urged that such criteria should *not* be considered part of the thermal standard (App. 205-08). EPA's counsel concluded (App. 231-32) that such

numerical criteria should be considered part of the overall standard and, because not applied verbatim to all sources, recommended on November 20, 1974, that New York's regulations be disapproved (App. 233). EPA rejected its counsel's advise.

On February 23, 1975, EPA advised New York of its decision (App. 209-10). It neither approved, nor disapproved, New York's thermal regulations. Instead, EPA chose, in effect, to modify them. While, on one hand, it purportedly approved New York's thermal standard and its numerical criteria, on the other hand, in an apparent effort to circumvent the controversy as to the application of New York's numerical criteria, EPA simply refused consideration of that aspect of the standard that limited the *per se* application of such numerical criteria to post-1969 sources. EPA's phrased its rationale as follows (App. 209):

> "However, I cannot approve sections 704.4, 704.5 or 704.6 of Part 704 nor references to the provisions of those sections contained in sections 704.1, 704.2 and 704.3, because they are not water quality standards as defined by the statutes and regulations to which EPA must adhere. Thus, I have excluded from EPA consideration under section 303(a) of the Act those aforementioned portions of Part 704 which are are inapplicable."

These conclusions were subsequently published in the Federal Register on March 25, 1975 (App. 25-26).

New York's thermal regulations accordingly stand as applying its numerical thermal criteria on a mandatory basis to post-1969 sources alone. But do they? This attempt by EPA to avoid the legal issue with which it was confronted apparently emasculated New York's thermal regulations and was contrary to the dictates of its authority and the procedures prescribed by the FWPCA. EPA's action may well have been intended to serve as a modification of New York's regulation. This it had no authority to do.

The FWPCA sets forth no standard or scope of review as to actions by EPA. *Cf. Scenic Hudson Preservation Conference v. Federal Power Commission,* 453 F.2d 463 (2d Cir. 1971). The scope of review is, therefore, presumably dictated by the provisions of Section 706 of the Administrative Procedure Act (5 U.S. § 706). *Cf. Harly v. Kleindienst,* 471 F.2d 823 (2d Cir. 1972); and *Environmental Defense Fund, Inc. v. Armstrong,* 487 F.2d 814 (9th Cir. 1973).

Section 706 empowers this Court to "hold unlawful and set aside" this action by EPA if it is found to be

> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
>
> (D) without observance of procedure required by law;"

EPA's determination fails to satisfy these standards and should be set aside. Neither the provisions of the FWPCA, nor logic, provide authority or a basis for EPA's action.

EPA's determination suggests that it's concern is limited to the water quality standard itself and cannot be addressed to the extent of the application of that standard. Such an approach is inconsistent with the Act under which its actions are mandated. Section 303(b) requires EPA to promulgate standards for New York

> "unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section."

EPA did not promulgate standards for New York. Section 303(a)(2), pertaining to intrastate waters, provides that:

> "Each such standard shall remain in effect, *in the same manner and to the same extent* as any other water quality

> standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972." (Emphasis added.)

This provision, as an example, demonstrates what one would conclude as a matter of logic—that the extent and manner of the applicability of a standard (or criteria) are as significant as the standard itself.

EPA's decision not to approve or disapprove the extent of the applicability of New York's thermal standard was capricious and contrary to the procedures dictated by the FWPCA. The application of New York's thermal water quality standards should have either been approved or disapproved by EPA. Its March 3, 1975 promulgation, which did neither, should be set aside and the matter remanded to EPA for review and action consistent with the FWPCA.

IV.

EPA's action should be set aside and the matter remanded for action consistent with the Federal Water Pollution Control Act.

Respectfully submitted,

PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER,
Attorneys for Petitioner,
3400 Marine Midland Center,
Buffalo, New York 14203,
Tele. (716) 847-8400.

Of Counsel:
David K. Floyd

SUPPLEMENT TO BRIEF

Statutory References

"TITLE III—STANDARDS AND ENFORCEMENT

"EFFLUENT LIMITATIONS

"SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

"(b) In order to carry out the objective of this Act there shall be achieved—

"(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

"(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

"(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

"(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act; and

"(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act.

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

"(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

"(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

"(f) Notwithstanding any other provisions of this Act it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

"WATER QUALITY RELATED EFFLUENT LIMITATIONS

"SEC. 302. (a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

"(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

"(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

"(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 of this Act.

"WATER QUALITY STANDARDS AND IMPLEMENTATION PLANS

"SEC. 303. (a)(1) In order to carry out the purpose of this Act, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall, within three months after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

"(2) Any State which, before the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this Act unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

"(3)(A) Any State which prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, adopt and submit such standards to the Administrator.

"(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, he shall approve such standards.

"(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

"(b)(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, if—

"(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section,

"(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

"(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

"(c)(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

"(2) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

"(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

"(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

"(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act, or

"(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act.

"(d)(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

"(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

"(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

"(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

"(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D), for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

"(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

"(e)(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act.

"(2) Each State shall submit not later than 120 days after the date of the enactment of the Water Pollution Control Amendments of 1972 to the Administrator for his approval a proposed continuing planning process which is consistent with this Act. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act. The Administrator shall not approve any State permit program under title IV of this Act for any State which does not have an approved continuing planning process under this section.

"(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

"(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

"(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208, and applicable basin plans under section 209 of this Act;

"(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

"(D) procedures for revision;

"(E) adequate authority for intergovernmental cooperation;

"(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

"(G) controls over the disposition of all residual waste from any water treatment processing;

"(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302.

"(f) Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 301(b)(1) and 301(b)(2) nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

"(g) Water quality standards relating to heat shall be consistent with the requirements of section 316 of this Act.

"(h) For the purposes of this Act the term 'water quality standards' includes thermal water quality standards.

"NATIONAL STANDARDS OF PERFORMANCE

"SEC. 306. (a) For purposes of this section:

"(1) The term 'standard of performance' means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

"(2) The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

"(3) The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

"(4) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a source.

"(5) The term 'construction' means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

"(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

"pulp and paper mills;
"paperboard, builders paper and board mills;
"meat product and rendering processing;
"dairy product processing;
"grain mills;
"canned and preserved fruits and vegetables processing;
"canned and preserved seafood processing;
"sugar processing;
"textile mills;
"cement manufacturing;
"feedlots;
"electroplating;
"organic chemicals manufacturing;

"inorganic chemicals manufacturing;
"plastic and synthetic materials manufacturing;
"soap and detergent manufacturing;
"fertilizer manufacturing;
"petroleum refining;
"iron and steel manufacturing;
"nonferrous metals manufacturing;
"phosphate manufacturing;
"steam electric powerplants;
"ferroalloy manufacturing;
"leather tanning and finishing;
"glass and asbestos manufacturing;
"rubber processing; and
"timber products processing.

"(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

"(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

"(3) The provisions of this section shall apply to any new source owned or operated by the United States.

"(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

"(d) Notwithstanding any other provision of this Act, any point source the construction of which is commenced after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of the Internal Revenue Code of 1954, whichever period ends first.

"(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

"THERMAL DISCHARGES

"SEC. 316. (a) With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.

"(b) Any standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

"(c) Notwithstanding any other provision of this Act, any point source of a discharge having a thermal component, the modification of which point source is commenced after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 and which, as modified, meets effluent limitations established under section 301 or, if more stringent, effluent limitations established under section 303 and which effluent limitations will assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in or on the water into which the discharge is made, shall not be subject to any more stringent effluent limitation with respect to the thermal component of its discharge during a ten year period beginning on the date of completion of such modification or during the period of depreciation or amortization of such facility for the purpose of section 167 or 169 (or both) of the Internal Revenue Code of 1954, whichever period ends first.

"NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

"SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

"(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

"(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

"(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

"(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304 (h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

"(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

"(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

"(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

"(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

"(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

"(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

"(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

"(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

"(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

"(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

"

"GENERAL DEFINITIONS

"SEC. 502. Except as otherwise specifically provided, when used in this Act:

"(1) The term 'State water pollution control agency' means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

"(2) The term 'interstate agency' means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

"(3) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

"(4) The term 'municipality' means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

"(5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

"(6) The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

"(7) The term 'navigable waters' means the waters of the United States, including the territorial seas.

"(8) The term 'territorial seas' means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

"(9) The term 'contiguous zone' means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

"(10) The term 'ocean' means any portion of the high seas beyond the contiguous zone.

"(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

"(12) The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

"(13) The term 'toxic pollutant' means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

"(14) The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

"(15) The term 'biological monitoring' shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

"(16) The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

"(17) The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

"(18) The term 'industrial user' means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category 'Division D—Manufacturing' and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

"(19) The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

"ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

"SEC. 509. (a)(1) For purposes of obtaining information under section 305 of this Act, or carrying out section 507(c) of this Act, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, or when relevant in any proceeding under this Act. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 304 (b) and (c) of this Act. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

"(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

"(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Bethlehem Steel Corporation
v
Environmental Protection Agency, et al

Docket No. 75-4119

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 6 day of March, 1976 I mailed 3 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to: each of the following:

Patrick A. Mully, Esq.
Pollution Control Section
Department of Justice
Washington, D.C. 20530

Warren H. Llewellyn
Asst. Regional Counsel
26 Federal Plaza
New York, New York 10007

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

David K. Floyd, Esq.

3400 Marine Midland Center, Buffalo, New York 14203

Leslie R. Johnson

Sworn to before me this

6 day of March, 1976

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977